IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.73 OF 2006

M/s Videocon International Ltd. ...Applicant

Vs.

M/s Video Links & Ors. ...Respondents

Shri R.D. Soni with Shri M.A. Saiyed i/by M/s. Ram & Co. for the Applicant.

Shri Shriram S. Kulkarni for the Respondents.

CORAM : A.M. KHANWILKAR, J.

DATE : JUNE 20, 2006.

ORAL JUDGMENT:

1. Heard Counsel appearing for the parties. Rule. Shri Shriram S. Kulkarni waives notice for the respondents. As short question of law arises, Rule is made returnable forthwith by consent.

2. This revision application takes exception to the judgment and order dated 13th September, 2005 passed by the District Court Pune at Pune in Misc. Civil Appeal No.196 of 2005. By the said decision the District Court allowed the Appeal preferred by the respondents and passed the following order:

"O R D E R

(1) Appeal is allowed.

(2) The judgment and order passed by the learned trial court in M.A.No.518/2004 is hereby set aside.

(3) The judgment and decree passed in Spl.C.S.No.1824/97 dated 13-7-2004 is hereby set aside.

(4) The learned trial court to decide the suit on merit by giving sufficient opportunity to the parties.

(5) The Special Civil Suit No.1824/97 be restored on the file on its original stage. For the same, the applicant to pay cost Rs.500/- to the respondent and to deposit the cost is a condition precedent.

(6) The parties to the proceeding to appear before the 4th Additional Judge, Small Causes Court, Pune on 13-10-2005.

(7) There is no order as to cost in respect of this appeal.

(8) Copy of this judgment be sent to the trial court."

3. Briefly stated, the applicant instituted suit against the respondents. The said suit was contested by the respondents by filing written statement. The respondents have also filed counter claim in the said suit. Issues were also framed in the suit. The Plaintiff filed evidence affidavit. As Defendant and Advocate were absent, court passed no cross order and posted the suit for arguments. Even on the adjourned

date the defendant and the Advocate were absent. The trial court accordingly heard arguments of the Advocates for Plaintiff and kept the matter for pronouncement of judgment. Accordingly, the Trial Court by judgment and decree dated 13th July, 2004 decreed the suit in favour of the applicant. The operative part of the order passed by the Trial Court on 13th July, 2004 reads thus:

"O R D E R

1. Suit is decreed.

2. Plaintiff is entitled to recover Rs.1,27,456/- from defendants holding them jointly and severally liable.

3. Plaintiff is also entitled to interest at the rate of Rs.6% p.a. on 1,27,456/- from 1.6.1996.

4. The sum of Rs.1,27,456/- shall carry future interest at the rate of 5% p.a. from the date of suit to till realisation.

5. Plaintiff is entitled to notice charges Rs.200/-.

6. Defendant's counter claim is dismissed.

7. Defendant to pay cost of the suit to plaintiff."

4. After this decision respondents filed

application purported to be under Order 9 Rule 13 of the Code of Civil Procedure, 1908. The relief claimed in the application is in following terms:

(a) The judgment and decree passed by the Trial Court dated 13th July, 2004 be set aside.

(b) Regular Civil Suit No.1824 of 1997 be decided on its own merits.

5. The Trial Court by the judgment and order dated 01st April, 2005 rejected the said application on the reasoning that the provisions of Order 9 Rule 13 of the Code were not applicable to the fact situation of the present case. Reliance was mainly placed on the reported judgment of this court in 2000(2) MhLJ 317 in the case of Himachal Pradesh Co-operative Marketing And Development Federation Ltd. Vs. M/s.Mafco Limited Pune. Against this decision, Respondents carried the matter before the District Court by way of Misc. Civil Appeal No.196 of 2005. According to the Respondents the Judgment of the trial court has not adverted to the written statement or

merit of its stand and the counter claim and that the defendant had not led any evidence so far, for which reason it was an ex-parte decree within the meaning of Order 17 Rule 2. The Appellate Court accepted the argument of the Respondents and allowed the Appeal preferred by the Respondents relying on another decision of this court in the case of Balu V. Radhakkabai 2004 (1) Mah. L.J. 323 and decision of the Supreme Court in the case of B. Janakiramaih Vs. A.K.Parthasarthi A.I.R. 2003 SC 3527, Consistent with that view, the final order came to be passed in the said Appeal which is already reproduced.

6. After having considered the rival submissions, two aspects will have to be considered in this Revision Application. Firstly, whether the decision of the Appeal Court in holding that application under Order 9 Rule 13 of the Code was available in the fact situation of the present case can be sustained. Secondly, what is the effect of the order passed by the Appeal Court. In much as, does it restore only the suit filed by the applicants or also the counter claim filed by the respondents.

7. I shall first deal with the question as to whether application preferred by the respondents was maintainable under Order 9 Rule 13 of the Code. The finding reached by the lower Appellate Court that the trial court has not addressed itself to the defence of the defendants is unexceptionable. Be that as it may, the facts established from the record are that the defendants had filed written statement as also counter claim. The defendants had not led evidence as the matter proceeded in their absence. What is relevant for our purpose is that there is no order calling upon the defendants to produce its evidence. Whereas, it appears that on 27.04.2004 both parties were absent. Matter was adjourned to 11.06.2004, on which date only plaintiff and their advocate were present but requested for time to produce evidence. Matter was adjourned to 18.06.2004, on which date plaintiff filed evidence affidavit on record. Suit was then posted to 25.06.2004 for plaintiff's cross-examination but defendants and their advocate failed to appear. The court passed no cross order and posted the suit to 03,07.2004. On that date the plaintiff and his advocate were present. Defendants and their Advocate remained absent. The court straightaway proceeded to

hear the arguments of the plaintiff and posted the suit on 07.07.2004. On that date the plaintiff produced certain documents. Even on this date the defendant and advocate were absent. The court heard the arguments of the plaintiff and placed the matter for judgment on 13.07.2004. The court thus delivered the Judgment and Decree. On this finding, the view taken by the lower Appellate Court relying on the reported decision referred to in the impugned judgment, of this court as well as Supreme Court, needs no interference. In my view, the exposition of the Apex Court in B.Janakiramah (supra) answers the point in issue. In fact, in that case the defendant had not only filed written statement but had also adduced the evidence.The defendants evidence was closed on 15.11.1998 and the matter was posted for arguments. In the meantime, defendant moved application for adducing additional evidence. That application was posted for counter affidavit and hearing. On 23.06.1999, however, the original suit was called out for final hearing and as defendant was absent matter proceeded and decree came to be passed. The defendant moved application under Order 9 Rule 13 which was allowed. The Supreme Court has upheld that

order in the facts of that case, while examining the purport of Order 17 Rule 2 and Rule 3. In para 8, it is observed that in order to determine whether the remedy under Order 9 is lost or not, it is necessary to find out whether in the first instance the court had resorted to the explanation of Rule 2 of Order 17. In para 9, it is observed that that explanation is in the nature of exception to the general power given to the court under Rule 2. The quintessence for invoking Rule 2, it is held in para 10 of this judgment that, is when the court is prima facie of the view that the absentee party has already led evidence or a substantial part thereof which in its view is sufficient to substantiate the absentee party's stand and for disposal of the suit (see para 11 also). In the same paragraph the distinction between Rule 2 and Rule 3 of Order 17 is noted and it is further observed that the power of the court to proceed on the basis that the absentee party is deemed to be present is permissive and not mandatory. In the facts of the present case, it is not possible to hold that the trial court had restored to the explanation to Rule 2 of Order 17. Suffice it to observe that the lower Appellate court has justly applied the ratio of Balu's

case (supra), which involved identical fact situation.

8. Mr. Kulkarni for the respondents has rightly invited my attention to yet another decision of this court reported in 2003(1) MhLJ 191 in the case of Chandrakant Babulal Panchal & Anr. Vs. Ashwinibhai Mancharam Patel & Anr. In this decision reference is made to the decision of the Supreme Court reported in AIR 1987 Supreme Court 42 in the case of Prakash Chander Manchanda & Anr. Vs. Smt. Janki Manchanda, which concludes the issue. In para 6 of the judgment the Apex Court has observed thus:

> "It is clear that in cases where a party is absent only course is as mentioned in Order 17(3)(b) to proceed under Rule 2. It is therefore clear that in absence of the defendant, the court had no option but to proceed under Rule 2. Similarly the language of Rule 2 as now stands also clearly lays down that if any one of the parties fails to appear, the court has to proceed to dispose of the suit in one of the modes directed under Order 9. The explanation to Rule 2 gives discretion to the court to proceed under Rule 3 even if a party is absent but that discretion is limited only in cases where a party which is absent has led some evidence or has examined substantial part of their evidence. It is therefore clear that if on a date fixed, one of the parties remain absent and for that party no evidence has been examined up to that date the court has

> no option but to proceed to dispose of the matter in accordance with Order 17 Rule 2 in any one of the modes prescribed under order 9 of Civil Procedure Code. It is therefore clear that after this amendment in Order 17 Rule 2 and Rule 3, of Civil Procedure Code there remains no doubt and therefore there is no possibility of any controversy. In this view of the matter it is clear that when in the present case on 30.10.1985 when the case was called nobody was present for the defendant. It is also clear that till that date the plaintiff's evidence has been recorded but no evidence for defendant was recorded. The defendant was only to begin on this date or an earlier date when the case was adjourned. It is therefore clear that up to the date i.e. 30.10.1985 when the trial court closed the case of defendant there was no evidence on record on behalf of the defendant. In view of the matter therefore the explanation to Order 17 Rule 2 was not applicable at all. Apparently when the defendant was absent Order 17 Rule 2 only permitted the Court to proceed to dispose of the matter in any one of the modes provided under Order 9."

9. Advocate Soni, appearing for the Applicant, however, submits that the fact situation in the present case is similar to one in the case of Himachal Pradesh Marketing and Development Federation Ltd. (supra). In the present case also, it is contended that, the respondents-defendants had filed written statement whereafter issues were framed and that the respondents also instituted counter claim. However, in my opinion, this will make no difference to the

legal proposition expounded in the two Apex Court decisions which are pressed into service by the respondents. Mr. Soni had placed emphasis on observation in para 10 of this reported case. In my opinion, having regard to the legal position expounded in the abovenoted two Supreme Court decisions, the view taken by the learned single Judge in the case of Himachal Pradesh Co. Operative (Supra) is not a good law. It is noticed that the decision of the Apex Court in the case of Prakash Chander (supra) was not brought to the notice of the learned Judge. In fact no decision was relied before the learned Judge.

10. Be that as it may, I have no hesitation in upholding the view taken by the lower Appellate Court that the decree passed by the Trial Court in this case is referable to the provisions of Order 17 Rule 2, against such decree remedy under Order 9 Rule 13 is and was available to the defendants. It may be noted that there is no challenge to the finding reached by the lower Appellate Court on the factum of sufficient cause made out by the Respondents for setting aside the ex-parte decree.

11. That takes me to the second issue raised in the present application. According to the applicant, the subject application filed by the respondents before the Trial Court under Order 9 Rule 13 was limited to setting aside the judgment and decree passed in the "suit" and for restoration of the "suit" to be decided on merits. It is submitted that in the remand proceedings before the trial court, the trial court is also proceeding with the counter claim which has not been restored. There is substance in this objection. In the first place, there is nothing in the operative order passed by the Appellate Court to assume that even the counter claim has been restored. In fact, no such assumption is possible in this case as the subject application filed by the respondents was limited to setting aside the exparte decree and to restore the "suit". There is no relief claimed nor can be construed as having been granted of setting aside the order of dismissal of the counter claim and of restoring the same to be tried on merits. For, the relief as claimed in the application under Order 9 Rule 13 of the Code is limited to setting aside of the judgment and decree and to restore the "suit" to the file to be tried on merits. Indeed, reference is made

in the recitals of the subject application to the institution of counter claim by the Respondents, but no specific relief is claimed in the application as filed, for setting aside the order of dismissal of counter claim and for restoration thereof to be tried on merits.

12. To get over this difficulty the counsel for the respondents contends that the applicant cannot be permitted to take the respondents by surprise, by allowing them to raise this contention for the first time before this court. This submission clearly over-looks that the question of raising this ground for the first time before this court. arisen only because of the fact that the trial court is misconstruing the order of the lower Appellate Court which is impugned in this revision. The Applicant had succeeded before the trial court upon rejection of the application for that limited relief. The appeal was only continuation of the original application filed under Order 9, Rule 13. It is on that basis, ground has been taken in the revision application in terms of clause (f)- that it is not open to the lower court (trial court) to proceed with the counter claim on merits until the

order passed thereon is set aside and same is formally restored to the file. In the circumstances, even if the revision fails on merits, it is clarified that only the order which is impugned in this revision setting aside the judgment and decree passed in the suit dated 13th April, 2004, and restoring the "suit" to the file to its original number to be tried by the Trial Court on its own merits is upheld. In other words, it is not open to the trial court to proceed with the counter claim until the order passed thereon is set aside and the same is restored to the file.

13. Counsel for the respondents, at this stage, prays that in that case the respondents be granted liberty to move the lower court for appropriate relief in so far as the order passed on the counter claim is concerned. It is clarified that if such application is filed by the respondents the same be considered on its own merits in accordance with law.

14. Revision disposed on the above terms, with no order as to costs.

JUDGE